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IN THE

# Supreme Court of the United States

October Term, 1987

THE BANK OF NOVA SCOTIA,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## REPLY BRIEF FOR PETITIONER THE BANK OF NOVA SCOTIA

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*It is beyond argument that the Government's conduct in this case was outrageous . . . . [T]he record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones.*

— SEYMOUR, Circuit Judge,
dissenting

The government does not adequately respond to the question that this Court agreed to review. The real policy issues are: who should protect the integrity of the grand jury process from willful, repeated, and pervasive misconduct by government attorneys and how are such assaults on the integrity of the grand jury process to be deterred? The question is not, as the government would seem to have it, what remedy need be applied in the event of isolated, inadvertent, technical mistakes.

Having first demeaned the constitutional function of the grand jury as standing between prosecutors and accused and having then belittled the supervisory role of district courts in ensuring the grand jury's independence, the government retreats from such unacceptably broad premises to trivializing the prosecutors' purposeful misconduct in this case. To do so, the government ignores the factual finding by the district court, undisturbed even by the majority of the Court of Appeals, that the prosecutors' per-

vasive misconduct undermined the integrity of the grand jury system, was deliberate, and was motivated by their expressed resolve to prejudice the targets.

In such instances, falling back on a harmless error panacea is not sufficient: whether or not a harmless error standard is appropriate to inadvertence, that is not in any event subject to deterrence, the harmless error concept cannot be invoked to bar district courts from effectively sanctioning deliberate, systematic, and improperly motivated misconduct. Nor is government inconvenience in pretrial hearings alleviated by a standard requiring prejudice to the defendants: those hearings have been and will be held even if the standard is "prejudice," which the government acknowledges is already a relevant inquiry. Finally, the specter of unbridled judicial review without criteria which the government suggests will flow from reversal here is groundless: this Court already has articulated a workable standard in *United States* v. *Hasting*, 461 U.S. 499 (1983) for pretrial dismissal of an indictment pursuant to courts' supervisory powers.

## I.

### The Court Of Appeals Did Not Disturb The District Court's Finding That The Prosecutors' Misconduct Was Purposeful And Pervasive, Was Motivated By A Resolve To Prejudice The Defendants, And Undermined The Integrity Of The Grand Jury System

The government has attempted to evade the fact that the overwhelming majority of the district court's factual findings as to the prosecutors' base motives and intent were undisturbed on appeal. The district court's findings, while restricted to the major occurrences of misconduct,[1] were based upon a record that revealed wholesale violations of the rules and standards of conduct before grand juries, and which showed the prosecutors' explana-

[1] Because the hearing and district court opinion in this case occurred before this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), the district court thought that the Rule 6(d) violations alone mandated dismissal. Thus, the district court made no effort to address every issue of misconduct and in reality, because of the legal posture of the case, never ruled on the question of "prejudice" based upon the entirety of the record.



tion for their misbehavior to be both arrogant and incredible. The government disregards this record, which distinguishes the instant pretrial case from virtually every case relied upon by the government. Instead, the government urges upon this Court an analysis taken out of the context of the record and, as if no finding of deliberateness were made, the government incorrectly suggests that the demonstrative acts of misconduct cited as most egregious by the district court were aberrations in an investigation undertaken "fairly and professionally." Gov't Br. 28.[2]

The government's euphemistic review of the facts does not withstand scrutiny. The government ignores those record facts that demonstrate the misconduct to be deliberate, pervasive, and substantive. In pursuing its claim of isolated error, the government has defied the record which reveals that serious misconduct in the grand jury presentation here was the rule and not the exception.

The record graphically reveals that the district court was confronted with prosecutors whose misconduct was unceasing, who throughout the grand jury proceedings repeatedly and wrongly injected their personal views into the proceeding, and whose numerous contradictions, inconsistencies, and incredible explanations during their hearing testimony undoubtedly con-

[2] References to "Gov't Br. __" are to the Brief for the United States in Cases Nos. 87-578 and 87-602 dated March 1988. References to the main Brief for Petitioner The Bank of Nova Scotia in Case No. 87-578 dated February 25, 1988 are designated "Bank's Br. __". Citations to the appendix to the petition for the writ of certiorari filed on behalf of The Bank of Nova Scotia are denoted by an uppercase letter followed by the page number (*e.g.*, "A10", "B14"). Citations to the Joint Appendix are denoted as "JA __." Citations to the original record are provided for material that has not been reproduced in the Joint Appendix: "K.Tr." references are to the transcripts of the hearings before the Honorable John L. Kane; "W.Tr." references are to the transcripts of the hearings conducted by the Honorable Fred E. Winner; "T.Tr." references are to the transcripts of Kilpatrick's obstruction trial; and "G.J.Tr." references are to the transcripts of the proceedings before the grand jury.

firmed for the district court that the motives for their misconduct were improper.[3]

For example, the government attempts to dismiss in a footnote the patently false statements to the grand jury by one of the prosecutors during the supposed "summaries" when he falsely told the grand jurors that the Bank was "told that it was the IRS they were defrauding." Gov't Br. 35, n.22. However, this was but one example of the prosecutor's consistent pattern of injecting his own creditability into the proceedings and often irrelevantly and improperly disparaging the targets by making unsupported or prejudicial statements. The record before the district court revealed that this pattern was set from the outset of the proceedings when, prior to any evidence being elicited, the prosecutor improperly asserted that "the evidence that *has been* received would indicate that [the tax shelter] financing is *in fact* a fraud," G.J.Tr., Remarks, 7/8/81 at 8:39 a.m., p. 6 (emphasis supplied), and when the same prosecutor attempted to prejudice the grand jury by remarking that "[a]s a matter of fact, the Cayman Islands has

[3] The prosecutors' lack of credibility was established both through their demeanor at the hearings and the trial on the Kilpatrick obstruction of justice count and by the numerous times their testimony was contradicted. On some occasions the prosecutors' testimony was contradicted by third parties. *Compare* W.Tr. 43-45, 58, 69, 128, 133, 906, 961 *with* K.Tr. 427-428, 432, 434, 479; *compare* W.Tr. 143 *with* K.Tr. 534; *compare* W.Tr. 146 *with* K.Tr. 1136; *compare* W.Tr. 323, 326, 378-380, 402, 506 *with* K.Tr. 502-504; *compare* T.Tr. 456-480, 495-96 *with* K.Tr. 481; *see also* W.Tr. 277, 285 (IRS Agent Raybin denies testimony of former United States Attorney James L. Treece that he called Mr. Treece a liar). On some occasions the prosecutors contradicted one another. *Compare* K.Tr. 452 *with* K.Tr. 679; *compare* K.Tr. 810 *with* K.Tr. 1135-1136. On other occasions the prosecutors' testimony was internally inconsistent. *See* K.Tr. 620, 897-900; *compare* W.Tr. 700 *with* K.Tr. 1116. Finally, in some instances the prosecutors' explanations for their misconduct were simply incredible. *See, e.g.*, K.Tr. 1114 (apologia for *Massiah* violations); JA 72-82 (justifying illegal imposition of secrecy obligation on targets' attorneys). Also greatly detracting from their credibility were their flippant responses to the varied questions posed to them about their conduct. *See, e.g.*, K.Tr. 585 (prosecutor responds to question about his unprofessional conduct by asserting that he "barely claim[s] to know anything about the American Law"); K.Tr. 1137 (allegations of misconduct are "silly and frivolous").



gained an international reputation in that regard of being a *tax evasion country*." JA 94 (emphasis supplied).

Consistent with their technique of inflaming the grand jurors' passions with irrelevant and prejudicial information and misinformation, the prosecutors also permitted one of the purported "agents of the grand jury" gratuitously to tell the grand jurors that a business with which Mr. Kilpatrick once had been affiliated was under a separate investigation, G.J. Tr., IRS Agent Raybin, 1/6/81 at 1:33 p.m., p. 33, and that a business associate of Mr. Kilpatrick had been convicted of bank fraud.[4] On another occasion, the same agent was allowed to refer to an utterly unsupportable allegation of "possible organized crime ties" on the part of Kilpatrick. G.J.Tr., IRS Agent Raybin, 7/8/81 at 9:11 a.m., p. 5. Initially, the prosecutor did nothing to cure this blatantly prejudicial misassertion. The agent was forced to admit the lack of substance to the organized crime allegation only after being put on the spot by a grand juror's subsequent question. *Id.* at pp. 17-18.

The prosecutors indulged in the tactical use of inflammatory rhetoric to manipulate witnesses as well as grand jurors. On one occasion, prosecutors attempted to prejudice against the targets a witness scheduled to appear before the grand jury who was a general partner in some of the tax shelter entities. The prosecutor ominously—but falsely—alerted the witness that the targets had "happy feet" and were likely to flee with investor funds. K.Tr. 200-201.

The government likewise ignores the obvious harm to the targets' on-going tax shelter business intended by this disclosure.[5]

[4] This so inflamed a grand juror who had had business contact with the convicted Kilpatrick associate that the grand juror expressed a doubt as to her ability to be fair. Rather than report the grand juror's bias and self doubt to the district court, the prosecutor ignored it, saying "I got to make sure I end up with enough noses here to indict." G.J.Tr., Remarks, 8/5/81 at 4:1[illegible] p.m., pp. 2-4. This bizarre incident was repeated when a second grand juror who had had contact with the target and ultimate defendant Sheila Lerner also opined negatively about the defendants before the entire grand jury based upon her personal experience with Lerner. G.J.Tr., Remarks, 1/5/82 at 9:09 a.m., p. 27.

[5] The same kind of harmful disclosures were made by the prosecutors in October, 1981, when they mailed letters to the targets' on-going

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Indeed, this evidence, specifically the prosecutors' comments that something had to be done about it (K.Tr. 206), revealed to the district court why the prosecutors contemporaneously arranged to have eight IRS agents, in teams of two, "interview" 40 to 60 tax shelter investors in various cities, an event which was never disclosed, or the results of which presented, to the grand jury.[6]

There was also testimony that one of the prosecutors met in a bar with a grand jury witness, a former Department of Justice Attorney, who in private practice had represented some of the targets in their business. During the barroom conversation the prosecutor suggested that the witness not honor his attorney-client privilege and instead assist the prosecutor in putting the targets "behind bars." W.Tr. 43-45.[7]

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business associates specifically disclosing the grand jury investigation of the targets and their business. Although the government would like to explain that disclosure as one justified by the circumstance that the addressees were beyond the grand jury's subpoena power (Gov't Br. 46), an explanation also tried by the prosecutors and agents at the hearings, the government fails to point out that the prosecutors had to disavow that explanation before the district court. (JA 65-66).

[6] The government passes this event off as a minor circumstance by suggesting that only "several" investors were interview, instead of 40 to 60; and, contrary to the government's statement (Gov't Br. 45), *no* investors ever were subpoenaed to testify about their investments. (JA 23-24).

[7] Numerous other instances of the prosecutors' disregard for the rules of grand jury practice and the dictates of fair play are revealed by the record. For example, the prosecutors improperly issued grand jury subpoenas prior to impaneling a grand jury. G.J.Tr., Remarks, 7/8/81 at 8:39 a.m., p. 15. The prosecutors on several occasions permitted hearsay testimony concerning "informants" whose identities were not revealed to the grand jury, making it impossible for the grand jury to assess the credibility of the factual assertions. K.Tr. 221-222; G.J.Tr., Raybin, 2/2/81 at 9:56 a.m., pp. 6-10; G.J.Tr., Raybin, 1/6/81 at 1:33 p.m., p. 14. Finally, throughout the hearings on the issue of prosecutorial misconduct before the grand jury, the prosecutors demonstrated a lack of concern for the seriousness of the district court's inquiry and refused to observe the dictates of the court. *See, e.g.*, W.Tr. 89 (prosecutor refusing to step aside as

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The government's brief not only ignores this backdrop of overreaching in order to credit its assertion of "isolated errors" but also is compelled to understate the misconduct which it does confront.

For example, the government attempts to minimize the seriousness of the oaths administered "from the hip" and the description of "grand jury agents" supplied by the prosecutor from the Tax Division of the Department of Justice by suggesting they were only "terms" with no real meaning. However, the district judge unambiguously confirmed that he was *not* focusing on a "term" used but on the fundamental defect in continuously urging supposedly independent grand jurors to rely on the prosecutors' agents as agents whose interest was the same as that of the grand jury. *Kilpatrick II* at C3-C6.[8]

The government cannot dismiss these illegal oaths and loyalty descriptions as mere "technical errors".[9] The blurring of the

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hearing counsel despite fact that he was to be a witness); JA 89 (asserting that the allegations of misconduct are "silly and frivolous"); *see also* K.Tr. 1193-1194 (testimony of court reporter concerning prosecutors' abusive conduct toward court clerk).

[8] The government's current posture that the illegal oath and job description furnished by the prosecutor is simply a meaningless "term" is belied not only by the exalted role assigned to these IRS agents during the investigation, but also by the position that the Department of Justice continued to assert after an indictment had been returned. Until the practice was challenged in the hearings below, the government played on the prosecutors' anointment of these agents to argue that, as "grand jury agents", these IRS employees were acting consistent with the grand jurors' independent interests. In a brief filed in a related proceeding more than a year after the filing of the indictment the Department of Justice, referring to Mendrop and Raybin's activity in this case, asserted:

> They were assigned to *assist the grand jury in its investigation* of [the targets]. As such they became agents for the grand jury and *enjoyed the total immunity given to all grand jurors.*

K.Tr. 535 (emphasis supplied).

[9] Rule 6(c) prohibits a prosecutor from administering any oaths in the grand jury. Nevertheless, one of the Department of Justice prosecutors made up an oath which changed every time he

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distinction between the prosecutors' role and the grand jurors' function is precisely the difficulty both district court judges found to be posed by the government attorneys' unauthorized oath and job description.

Similarly, in defending the use of false and misleading summaries to obtain an indictment of the Bank, the government seeks a *de novo* review in this Court of arguments already rejected by the district court and which the majority below did not disturb in its *de novo* review. The district court found not only that the purported evidence supposedly summarized was known to be false as to "vital issues concerning the Bank's knowledge and intent" (*Kilpatrick II* at C27), but that the false summaries formed a "substantial basis for the indictment against the bank." *Id.* at C27-C28. [10]

The government's brief inaccurately implies that the "real question" as to the accuracy of testimony concerning a supposed trip to Denver by the Bank's branch manager Monte Smith had been resolved prior to the indictment. The full transcript of the section of the hearing testimony relied upon by the government, however, demonstrates quite the opposite. At the hearings, the government elicited that, after the prosecutors began to doubt the accuracy of the identification, they engaged in follow up investigatory work. After making an offer to produce this testimony, the government attorneys conspicuously avoided asking the testi-

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administered it and which often misstated the law regarding grand jury secrecy. *See* JA 91, 100-101; G.J.Tr., Schneider, 5/31/82 at 1:34 p.m., pp. 2-3.

[10] The government attempts to relitigate this finding by overstating in a pair of footnotes to its brief a hodgepodge of allegations that it now asserts demonstrate the Bank had the requisite knowledge and intent. Not only does the purported evidence fail to refute the falsity of the summaries as to the essential facts, but many of the supposed facts were not even included in the government's claimed summary for the grand jurors of important "evidence pertaining to the Bank of Nova Scotia." JA 189.



fying prosecutor the crucial follow up question as to whether the subsequent investigation alleviated the doubts. JA 88. [11]

The government's brief also makes its "technical" error response with respect to the illegal imposition of secrecy on two lawyers for targets. First, the government asserts that the deliberate violation of Rule 6(e) should be disregarded because it did not succeed in eliciting any privileged information. Next, the government contends that it should be considered "technical" because the government brief writers do not believe it was improperly motivated inasmuch as (again according to the brief writers) the prosecutor had nothing to gain by it. Gov't Br. 49. The district court, however, faced with what can only be described as incredible testimony by the offending prosecutor as to his motives, chose to disbelieve his self-serving excuse.

At the hearings the prosecutor insisted that "at the time" he violated Rule 6(e) he was thinking about an allegation that someone had offered to sell grand jury information to Kilpatrick, and he imposed the secrecy obligation for that purpose. JA 72-75. Judge Kane's disbelief of this explanation was well-founded. As Judge Kane found, the prosecutor had examined several witnesses on other occasions in this investigation and four other witnesses the same day as he examined the attorneys. Not one layman was directed to maintain secrecy. JA 72-82.

The prosecutor's explanation of his purpose also was impeached by his admission upon cross-examination (a portion of the record that the government brief writers appear to have skipped) that he was not at all concerned that either lawyer might try to sell his testimony. JA 77-78. Thus, imposing secrecy obligations on these attorneys did not serve, and was not intended to serve, the purpose offered by the government here to excuse the

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[11] The inference that the doubts as to the accuracy of the purported identification of Monte Smith were *not* dispelled at the time of the indictment was further supported by the testimony of Waters during the Kilpatrick obstruction trial. Waters described the person he met as being a "native of the Caribbean", T.Tr. 311; his description did not match the Canadian, non-Caribbean Monte Smith. *See* JA 87.

prosecutor's conduct. The district court correctly chose to credit the prosecutor's contemporaneous statement to the grand jurors, which revealed that he had called the lawyers and imposed an illegal secrecy obligation on them in the hope that they would reveal what was told to them by their clients. *See Kilpatrick II* at C18-C20, C42-C43; *see also* JA 126, 128. Such an abuse, like the pattern of other abuses by the prosecutors here, cannot be dismissed by the polite label "technical".

In sum, the government's attempt to continue to whitewash the deliberate, serious, and pervasive misconduct by isolating instances of it and suggesting it could not have affected the grand jury's probable cause decision fails. It fails because it ignores the totality of the record and further fails because it mischaracterizes the motive and consistency of the misconduct. The government cannot escape the district court's undisturbed factual findings that the misconduct was deliberate and ill-motivated.

## II.

**The Pretrial Dismissal Was Properly Tailored To Protect The Values Served By The Supervisory Power Of Federal Courts And The Interest In Prompt Administration Of Justice**

The government attempts to avoid the consequences of the serious, deliberate misconduct here by arguing that the harmless error doctrine precludes the invocation of the court's supervisory power. Aside from being founded upon a totally unrealistic appraisal of the record, this argument is also premised upon a misinterpretation of this Court's opinion in *United States* v. *Hasting*, 461 U.S. 499 (1983). *Hasting* did not hold that *deliberate misconduct* can *only* be remedied where there is a finding of prejudice. Rather, the Court in *Hasting* urged that a balancing test be applied before error can be deemed sufficient to warrant reversal of a conviction.

The government's additional arguments that *Costello* v. *United States*, 350 U.S. 359 (1956) renders all errors before an indicting grand jury immune from review and that permitting dismissals prior to trial for even deliberate governmental misconduct would be bad public policy are equally deficient.[12]



The government's assertion that this case involves technical or procedural errors is refuted by the record and the findings of the district court. Throughout the grand jury investigation, the prosecutors engaged in a flagrant pattern of misconduct designed to "break" the targets and undermine the grand jury's integrity. Their illegal overzealousness infected every stage of the proceedings and even prior to indictment resulted in complaint to the chief judge of the district court. *See* W.Tr. 326. Their abuse was not limited to the rampant violations of rules of procedure, but extended to unethical tactics and the use of invectives before the grand jurors and witnesses: a course of practice intended to corrupt the very fairness of the grand jury system.

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[12] The government's suggestion that *Costello* and its progeny provide an absolute bar to challenges of an indictment is not supported by those decisions. Those cases hold merely that a defendant may not challenge the "competency or adequacy" of the evidence presented to a grand jury. They do not, as the government itself admits, address a pattern of deliberate misconduct by prosecutors or attempts by the prosecutors to undermine the grand jury's historic role. Such misconduct is what is in issue here.

The rationale of *Costello* is that defendants should not be given an opportunity to test the government's evidence by means of mini-trials preliminary to the main event. *Costello*'s progeny were concerned primarily with ensuring that the grand jury be permitted broad investigative latitude. Those cases did not address issues relating to the grand jury's constitutional role as a "screening mechanism" to which the government here pays only passing lip service. As noted in the Bank's main brief, this Court has consistently urged that courts should act to maintain the grand jury's crucial independence and fairness. Indeed, even since the holding in *Costello* this Court has exercised its power to dismiss indictments because of improper grand jury practices without a showing of prejudice to an individual defendant. *See, e.g., Vasquez* v. *Hillery*, 474 U.S. 254 (1986); *see also Ballard* v. *United States*, 329 U.S. 187 (1946).

In *Vasquez*, this Court held that judicial intervention was necessary to ensure that this constitutionally essential screening function was protected from practices that threatened its fairness even if actual prejudice to a defendant was not demonstrated.

In this context, the government's argument that in the absence of proven prejudice to an individual defendant dismissal of an indictment pursuant to a court's supervisory power would conflict with 28 U.S.C. § 2111 and Fed. R. Crim. P. 52 (a) falls short. Although that statute and rule provide that errors or defects that do not affect the "substantial rights" of the parties should be disregarded, they clearly were not intended to deprive courts of their inherent supervisory authority to deter deliberate ill-motivated misconduct and to uphold the integrity of the administration of justice.[13] To apply harmless error as a *per se* requirement for a pretrial dismissal of indictments unless the prejudice is so significant as to overcome the grand jury probable cause standard will cripple the district court's ability to fulfill its role of supervising the grand jury and making prosecutors accountable in any effective way for their misconduct.

This Court repeatedly has held that supervisory power is the appropriate method by which district courts should act to ensure that the grand jury is not overreached. *See United States* v. *Calandra*, 414 U.S. 338, 346 n.4 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *Ballard* v. *United States*, 329 U.S. 187, 193 (1946); *Blair* v. *United States*, 250 U.S. 273, 280 (1919); *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906). This is not a case involving negligence, inadvertence, an unfortunate slip, or an isolated incident of misconduct. This is a case where the misconduct was so wanton and pervasive as to cause the district court to invoke a reasonable sanction to cleanse the process and to assure that the representation of the case would be free of the pattern of abuse discovered by examination of the record of the grand jury.

The supervisory power of federal courts is designed specifically to preserve the integrity of the criminal justice system and prevent flagrant disregard of the rules of procedure and standards of conduct. Even when actual prejudice to an individual defendant might not be demonstrated, the supervisory power

[13] Indeed, this Court in a post-conviction case analyzing former 18 U.S.C. § 556, the predecessor to Rule 52(a), noted that its purpose was to permit a court to disregard technical irregularities in form and procedure such as loose or inartful pleading so that "the guilty shall not escape through mere imperfections." *See Hagner* v. *United States*, 285 U.S. 427, 432 (1932).



provides an independent basis for remedying misconduct. *See* Bank's Br. 34; *see also Young* v. *United States*, ____U.S. ____, 107 S. Ct. 2124 (1987); *United States* v. *Hasting*, 461 U.S. 499, 522-528 (1983) (Brennan, J., concurring in part and dissenting in part). Indeed, if the defense is able to establish any prejudice it is constitutionally entitled to a remedy without invocation of supervisory authority. In effect, the government's approach reads supervisory authority out of the criminal justice system. Precisely for this reason, when applying the harmless error rule to even "attenuated" violations after conviction, this Court has held that courts must *balance* the purposes served by that rule against the purposes behind the exercise of a court's supervisory power. *United States* v. *Hasting*, 461 U.S. 499 (1983). As noted in the Bank's main brief, in this case that balancing test led the district court to dismiss the indictment with the right of the government to reindict. Bank's Br. 34-36.

The majority in *Hasting* did not, as the government suggests here, rule that supervisory power may not be exercised to remedy a "harmless" violation. This Court held merely that the supervisory power must not be exercised in a "vacuum" but must—particularly after trial—be considered in light of the "relevant interests" to be served by the "harmless error" rule. See also, *United States* v. *Lane*, 474 U.S. 438. *474* (1986) (Stevens, J., concurring in part and dissenting in part).

When, as here, the prosecutors' abuses brought to the attention of a district court prior to trial are deliberate, pervasive, and motivated by a desire to prejudice the defendants, a proper exercise of a court's supervisory power requires that prejudice to the integrity of the criminal justice system, not solely prejudice to an individual defendant, be assessed in determining whether "substantial rights" have been affected.[14] *See United States* v. *Hasting*, 461 U.S 499, 522-528 (1983) (Brennan, J., concurring in part and dissenting in part); *see also* Note, *Prosecutorial Misconduct in the*

[14] Indeed, given the low standard of proof required to return an indictment and the technical nature of rules such as 6(d) and 6(e), defendants likely would never be able to demonstrate actual prejudice from most deliberate violations. Thus, under the government's analysis, a court's supervisory power could never be used to remedy such violations.

*Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 Fordham L. Rev. 129 (1987). The compelling interest in the enforcement of criminal laws is adequately served by requiring the government to seek a new indictment untainted by abuse and, if one can be obtained, to proceed to trial. [15] Once a pattern of pervasive misconduct which calls into question the conduct of an entire prosecution is established, "[a] concern for actual prejudice . . . misses the point, for what is at stake is the public perception of the integrity of our criminal justice system." *Young* v. *United States*, ____ U.S. ____, 107 S.Ct. at 2140. This "case fits into the category of willful misconduct in which the severest sanction is appropriate." *Taylor* v. *Illinois*, _ U.S. _, 108 S. Ct. 646, 656 (1988).

Unlike *United States* v. *Mechanik*, 475 U.S. 66 (1986), this case does not involve a discrete technical violation the effect of which can be "gauged." *See Young* v. *United States*, _____U.S. _____, 107 S.Ct. at 2141. Rather, as in *Young*, the district court here found biased prosecutors whose bias permeated the proceeding. In the face of such a finding "[h]armless error analysis is not equal to the task of assuring [public] confidence" in the grand jury system. *Id.*

When exercised as it was here, the supervisory power provides a district court with the ability to tailor a remedy specifically to purge the taint caused by the prosecutors' illegal conduct without affecting society's right to the administration of its criminal

[15] The government's proposed harmless error standard also leaves no room for a court, as this Court did in *Young* v. *United States*, ____U.S. ____, 107 S.Ct. 2124 (1987), to consider the *possibility* of prejudice in determining the need to fashion an appropriate remedy pursuant to its supervisory power. As this Court noted in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), the purpose of the grand jury is not only to ensure that probable cause exists but also to select the severity and number of offenses with which a particular defendant will be charged. Although the district court and the majority of the Tenth Circuit in this case disagree as to whether prejudice to the defendants definitely was established, the possibility that the grand jury process may have been affected by the prosecutors' deliberate misconduct—including the misleading summaries, the improper remarks, the illegal use of "grand jury agents," and the manipulation and abuse of witnesses— cannot be disregarded. See also, *United States* v. *Lane*, 474 U.S. 438, 474 (1986) (Stevens, J., concurring in part and dissenting in part).



laws. No evidence is withheld (Contrast, *Taylor* v. *Illinois*, _ U.S. _, 108 S. Ct. 646 (1988)) and no properly chargeable defendant escapes prosecution. At the same time the public, including future grand jurors and future grand jury witnesses, are assured that the integrity of their system is maintained and defendants are guaranteed an indicting decision made by a grand jury not overreached by the prosecutor.

The futility of the government's suggestion that alternatives other than dismissal may be appropriate is demonstrated in this case. The contempt sanction is rarely employed—primarily because no party is likely to have an interest in pursuing such a remedy and courts are loath to impose it *sua sponte*. In fact, government counsel during the district court hearings urged the district court to consider remedies *other than contempt* to deal with the prosecutors' pattern of abuse in this case. W.Tr. 861. Moreover, the current Department of Justice, as could be expected, has not been vigilant in investigating itself.[16] In this case, as the district court was aware, although the Department of Justice ostensibly investigated the prosecutors' conduct, it took no disciplinary action despite a proven pattern of misconduct and an undisputed court finding that the misconduct was intentional. *See* K.Tr. 841; Bank's Br. 39. Instead, one of the offending prosecutors was given a grade raise, and the prosecutors' illegal conduct was "applauded" by their superiors. *See* K.Tr. 1073; Bank's Br. 39. Indeed, shortly after the publication of Judge Winner's opinion critical of the prosecutors, one of the prosecutors received an "outstanding attorney award" from the Department of Justice. K.Tr. 1073.

[16] The alternative remedy of a Department of Justice disciplinary proceeding is illusory at best and cannot provide even a minimal deterrent to federal prosecutors intent on engaging in egregious misconduct. The government reports that during 1985 the Department of Justice completed 278 investigations of misconduct. Gov't Br. 24, n.10. The government has artfully avoided noting that less than half of these investigations involved allegations against a departmental attorney and only 13% involved abuse of prosecutorial or investigative authority. Office of Professional Responsibility, *Ann. Rep. to Att'y Gen.* (1985) at 3-4. Neither does the government give any information on the results of such investigations. Certainly that process fell woefully short in this case.

The elimination of the district court's supervisory authority to enforce its obligation to properly administer the grand jury and insure its fairness and independence will deprive the court of the power to fulfill this responsibility and will bring further disrespect to an institution designed by the framers of the Constitution to protect the public from the unbridled power of the executive. The government's position here invites this Court, by putting its imprimatur on pervasive, deliberate prosecutorial abuse, to adopt the cynicism of those who believe the grand jury has become nothing more than a "rubber stamp".



## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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